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No. 82-1445

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

THE DON'T BANKRUPT WASHINGTON COMMITTEE, APPELLANT

v.

CONTINENTAL ILLINOIS NATIONAL BANK AND TRUST COMPANY OF CHICAGO, SEATTLE-FIRST NATIONAL BANK, MORGAN GUARANTY TRUST COMPANY OF NEW YORK, AND THE UNITED STATES OF AMERICA

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MOTION OF APPELLEE CONTINENTAL ILLINOIS NATIONAL BANK AND TRUST COMPANY OF CHICAGO TO DISMISS OR AFFIRM

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QUESTIONS PRESENTED

1. Whether appellant, a self-appointed "citizens' group" which campaigned for the enactment of a state statute invalidated by the court of appeals, has standing to take an appeal to this Court to defend that statute when the responsible officials of the state involved have decided not to take an appeal.

2. Whether a state statute that retroactively impairs the security for and market value of municipal bonds by subjecting the essential terms of the bond covenants to a veto by public referendum conflicts with Art. I, §10, Cl. 1 of the Constitution, which forbids any state to "pass any * * * Law impairing the Obligation of Contracts."

LIST OF PARENT COMPANIES, SUBSIDIARIES AND AFFILIATES

The parent company of appellee Continental Illinois National Bank and Trust Company of Chicago ("Continental Bank") is Continental Illinois Corporation. Continental Bank's subsidiaries and affiliates, other than wholly owned subsidiaries and affiliates, are Continental Illinois Leasing S.A. (Spain), Commercial Continental Limited (Australia), Compania Financiera Ecuatoriana de DeSarrollo S.A. (Ecuador), Malaysian International Merchant Bankers Berhad (Malaysia), Rizal Commercial Banking Corporation (Philippines), and NAL Merchant Bank Limited (Nigeria).

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MOTION OF APPELLEE CONTINENTAL ILLINOIS NATIONAL BANK AND TRUST COMPANY OF CHICAGO TO DISMISS OR AFFIRM

Pursuant to Rule 16 of the Rules of this Court, appellee Continental Illinois National Bank and Trust Company of Chicago moves to dismiss the appeal herein on the ground that appellant lacks standing under traditional prudential requirements and under Article III of the Constitution to invoke the appellate jurisdiction of this Court. In the alternative, appellee moves for an order summarily affirming the judgment below since it correctly applies legal principles recently articulated by this Court to the facts of this particular case.

OPINION BELOW

The opinion of the court of appeals (J.S. App. 1a-20a) is reported at 696 F.2d 692. The opinion of the district court (J.S. App. 21a-23a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on January 11, 1983. A notice of appeal was filed by appellant on January 20, 1983. The jurisdictional statement was filed on February 25, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(2). As explained on pages 6-17, *infra*, this Court lacks jurisdiction to entertain the instant appeal because the sole appellant in this case, The Don't Bankrupt Washington Committee, lacks standing under traditional prudential standards and under Article III of the Constitution to invoke the appellate jurisdiction of the Court. See *Valley Forge Christian College* v. *Americans United For Separation Of Church and State*, 454 U.S. 464 (1982).

STATEMENT

1. In December 1981, appellees Continental Illinois National Bank and Trust Company of Chicago ("Continental Bank"), Seattle-First National Bank, and Morgan Guaranty Trust Company of New York filed a complaint in the district court alleging that a newly enacted statute of the State of Washington, referred to as Initiative 394, violated the Contract Clause of the Constitution.[1] The complaint named as defendants the State of Washington, the Governor, the Attorney General, and the Secretary of State. In April 1982, the United States filed a parallel suit against the same defendants, also alleging that Initiative 394 violated the Contract Clause (J.S. App. 2a).

[1] The statute (Initiative 394, Ch. 6, 1981 Wash. Laws, 2d Ex. Sess.) is reproduced at J.S. App. 26a-32a. Continental Bank and the other bank appellees brought suit in their capacity as trustees for public bondholders whose contractual rights were impaired by this legislation (J.S. App. 2a n. 1). In addition to their challenges under the Contract Clause, the bank appellees alleged that the state statute infringed the Equal Protection, Commerce, and Supremacy Clauses of the Constitution.

Initiative 394 provides that the Washington Public Power Supply System ("WPPSS"), a municipal corporation empowered to issue bonds, may not in the future issue additional bonds to finance the completion of certain public utility construction projects unless issuance of those bonds is first approved by a public referendum. See J.S. App. 6a-9a. Appellees alleged that this Initiative impaired covenants previously made by WPPSS to its bondholders and to the United States, which required the issuance of additional bonds to complete three of its utility construction projects ("Projects 1, 2 and 3").[2]

Appellant, The Don't Bankrupt Washington Committee, moved to intervene in both cases in the district court. It claimed that it had an interest in the litigation because it participated in the drafting of the Initiative, because it had campaigned for passage of the Initiative, and because it possessed expertise concerning the Initiative and its history.[3] The district court permitted appellant to intervene as an additional defendant (J.S. App. 2a).

2. Following extensive pre-trial proceedings, the parties submitted the case on a stipulated record and filed legal memoranda analyzing the constitutional questions presented. After reviewing the record, the district court entered judgment in favor of appellees, concluding that Initiative 394 violated the Contract Clause of the Constitution.

The district court found by a "preponderance of the evidence" that Initiative 394 injured bondholders by "immediately impairing their contractual rights," by "reducing the security for their bonds," by "creating uncertainty as to the ability of [WPPSS] to finance the completion of each project"

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[2] In the words of the court of appeals (J.S. App. 14a-15a): "The issuance of additional bonds by WPPSS is essential to the performance of its contracts * * *."

[3] For the convenience of the Court, we have lodged copies of appellant's motion to intervene together with the supporting papers.

that it had covenanted to complete, and by "reducing the value of [the] bonds on the secondary market" (J.S. App. 21a-22a). The district court also found (*id.* at 22a) that the statute imposed a "retroactive" and "substantial" impairment of the contractual rights of bondholders. Applying this Court's decision in *United States Trust Co.* v. *New Jersey*, 431 U.S. 1 (1977), the district court concluded that the impairment was neither "reasonable" nor "necessary," and that the statute therefore was unconstitutional as retroactively applied to Projects 1, 2 and 3 (J.S. App. 23a).

3. The court of appeals unanimously affirmed the decision of the district court, finding that it had correctly applied the principles of *United States Trust Co.* v. *New Jersey, supra*, and *Allied Structural Steel Co.* v. *Spannaus*, 438 U.S. 234 (1978). The court of appeals observed that Initiative 394 "permits destruction" of the "primary purpose" of the contracts at issue in this case (J.S. App. 11a), and that the state did not "reserve" the right to nullify its commitments in this fashion (*id.* at 11a-14a). It also upheld the district court's conclusion that the state statute substantially impairs the rights of appellees because it abrogates commitments "essential to the performance of [WPPSS'] contracts" (*id.* at 14a-15a). Finally, the court of appeals ruled that retroactive impairment of these contractual rights was wholly without justification, since the state's professed goal of promoting economy could be achieved by means other than retroactive impairment of the contractual rights of the United States and public bondholders (*id.* at 16a-20a).[4]

4. Following the decision of the court of appeals, the State of Washington, by its Attorney General, entered into an agreement with WPPSS. See Add., *infra*, A-1 to A-5. Under that agreement, WPPSS promised to submit to an extensive cost-effectiveness evaluation prior to the issuance of additional bonds to fund construction of any of its projects. *Id.* at A-2 to

[4] The court of appeals, like the district court, did not reach the other constitutional claims raised by appellees.

A-4. In return, the Attorney General, acting in his official capacity "as counsel for the State of Washington and [the] state officers named as parties," promised "not to seek review by the United States Supreme Court." *Id.* at A-4. That decision rested on the Attorney General's assessment of "all matters relating to the availability of review by the United States Supreme Court and the contractual undertaking by the Washington Public Power Supply System" (*ibid.*), as well as the need for "a prompt, final resolution of that litigation." *Id.* at A-1. In particular, the Attorney General made his decision not to appeal after careful consideration of "the consequences to the citizens of the state [of] continuing this litigation." *Id.* at A-2. The agreement signed by the Attorney General of the State of Washington is set forth in full in the addendum attached hereto.[8]

Despite the fact that the government official responsible for conducting litigation on behalf of the State of Washington has decided not to seek review in this Court, appellant has filed a notice of appeal and a jurisdictional statement. In its jurisdictional statement, appellant argues that the decision of the court of appeals is in error and should be reversed. For the reasons set forth below, however, appellant does not have standing to invoke the appellate jurisdiction of this Court and its attempted appeal should be dismissed.

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[8] Having considered "the mutual interests of the State, its citizens, and the Washington Public Power Supply System" (*id.* at A-2), the Attorney General "promises and agrees *not to seek review* by the United States Supreme Court" (Add., *infra*, A-4; emphasis in original). The Attorney General reserves the right to file a document expressing views in this Court only if the Court previously has noted probable jurisdiction over an appeal filed by some "other party" (*id.* at A-5).

ARGUMENT

I. APPELLANT, A CITIZENS' GROUP WHICH HAS NOT SUFFERED CONCRETE HARM AS A RESULT OF THE DECISION OF THE COURT OF APPEALS, AND WHICH HAS NO AUTHORITY TO CONDUCT LITIGATION ON BEHALF OF THE STATE OF WASHINGTON, LACKS STANDING UNDER TRADITIONAL PRUDENTIAL REQUIREMENTS AND UNDER ARTICLE III OF THE CONSTITUTION TO INVOKE THE APPELLATE JURISDICTION OF THIS COURT

Although appellant is quick to advance constitutional arguments for overturning the decision of the court of appeals, it wholly overlooks the fundamental question whether it has standing to invoke this Court's appellate jurisdiction. As an examination of the documents filed by appellant in this litigation clearly discloses, appellant lacks standing to appeal under Article III of the Constitution — which embraces only actual "case[s] or controvers[ies]," not abstract debates over issues of good government.

The constitution and statutes of the State of Washington charge the Governor and Attorney General with the duty to "see that the laws are faithfully executed" through litigation in appellate courts.[6] This appeal is *not* brought by the Attorney General of the State of Washington or any other responsible government official. The representatives of the State of Washington have, in the words of appellant's counsel, "decided not to appeal"[7] and "have no interest in the outcome of this

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[6] Wash. Const. Art. III, §5; Wash. Rev. Code Ann. §43.10.030 (West 1982); *Young Americans for Freedom* v. *Gorton*, 588 P.2d 195 (Wash. S. Ct. 1978) (en banc).

[7] March 1, 1983, letter from counsel of record for appellant, reproduced at Add., *infra*, A-7.

appeal."[8] In view of that fact, the Clerk's Office has directed appellant to "change the cover of the Jurisdictional Statement" to clearly disclose that the State is not a party appellant.[9] Rather than seeking review by this Court, the State of Washington has entered into a compact with WPPSS, by which it has waived its right of appeal in favor of an agreement requiring WPPSS to conduct comprehensive cost-effectiveness studies. That compact, signed by the Attorney General, was designed to serve the "mutual interests of the State, its citizens, and the Washington Public Power Supply System." See Add., *infra*, A-2.

Thus, the only appellant in this case is a self-appointed "citizens' group" which, according to the jurisdictional statement, "drafted and campaigned for" Initiative 394 (J.S. 3). While such a "citizens' group" undoubtedly has sufficient concern over state legislation to participate in the political process, it does not have a direct personal stake in the outcome of the present litigation that would permit it to invoke this Court's appellate jurisdiction after the Attorney General has determined that the state will not take an appeal.

1. Before examining in greater detail appellant's insubstantial interest in the present litigation, we briefly summarize the governing legal principles. The standing doctrine represents a "blend of constitutional requirements and prudential considerations" that confine the jurisdiction of all federal courts. *Valley Forge Christian College* v. *Americans United For Separation Of Church And State*, 454 U.S. 464, 471-472 (1982). Thus, a party invoking the jurisdiction of this Court has the burden of clearly demonstrating, on the basis of the record compiled below, that he has suffered or is about to suffer "a distinct and palpable injury to himself" (*Gladstone*,

[8] February 25, 1983, letter from counsel of record for appellant filed pursuant to Rule 10.4 of the Rules of this Court, reproduced at Add., *infra*, A-9.

[9] See Add., *infra*, A-7.

Realtors v. *Village of Bellwood*, 441 U.S. 91, 100 (1979)). This requires a demonstration of "particular concrete injury" (*United States* v. *Richardson*, 418 U.S. 166, 177 (1974))—injury which is not "abstract" (*Schlesinger* v. *Reservists To Stop The War*, 418 U.S. 208, 217 (1974)), "hypothetical" (*id.* at 224), "uncertain" (*Valley Forge Christian College, supra*, 454 U.S. at 477), or "indirect" in character (*Roe* v. *Wade*, 410 U.S. 113, 128 (1973)).

Beyond this, a party seeking to invoke the judicial process may not present its case "in the rarified atmosphere of a debating society" or attempt to use the federal courts as "publicly funded forums for the ventilation of public grievances" (*Valley Forge Christian College, supra*, 454 U.S. at 472, 473). Because litigants are precluded from suing "to air * * * generalized grievances about the conduct of government" (*id.* at 483), they may not assert claims "shared in substantially equal measure by all or a large class of citizens" (*Warth* v. *Seldin*, 422 U.S. 490, 499 (1975)). A party must, in short, allege "an injury peculiar to himself, as distinguished from the great body of his fellow citizens" (*Schlesinger, supra*, 418 U.S. at 220 n. 8). It is insufficient that he "suffers in some indefinite way in common with people generally" (*ibid.*). This Court repeatedly has held that citizen-plaintiffs may not champion a "general interest common to all members of the public" (*Ex Parte Levitt*, 302 U.S. 633, 634 (1938)), or debate in federal court "abstract questions of wide public significance" (*Warth, supra*, 422 U.S. at 500).

To the extent that a litigant alleges financial harm, it is essential to show a "direct pecuniary injury" (*Doremus* v. *Board of Education*, 342 U.S. 429, 434-435 (1952)), or a "direct dollars-and-cents" interest that is "measurable" and which forms the basis for a "good-faith pocketbook action" (*ibid.*). It does not suffice to claim "indeterminable" economic loss or financial harm that is "fluctuating and uncertain" (*Frothingham* v. *Mellon*, 262 U.S. 447, 487 (1923); *Richardson, supra*, 418 U.S. at 174-180).

In addition, a party claiming standing must establish that its individualized injury "is likely to be redressed by a favorable decision" (*Valley Forge Christian College, supra,* 454 U.S. at 472), and that it "personally would benefit in a tangible way from the court's intervention" (*id.* at 481 n. 17). Standing will be denied if it is "speculative whether the desired exercise of the court's remedial powers" would benefit the party (*Simon* v. *Eastern Kentucky Welfare Rights Organization,* 426 U.S. 26, 43, 44-46 (1976)).

This Court also has confirmed that the standing doctrine precludes suit if the would-be litigant is not "the 'proper party' to present the claim" (*Schlesinger, supra,* 418 U.S. at 218). Thus, the standing doctrine "focuses on the party seeking to get his complaint before a federal court and not on the issues he wishes to have adjudicated" (*Valley Forge Christian College, supra,* 454 U.S. at 484). It closes the federal courts to "questions of broad social import where no individual rights would be vindicated" and limits access to "those litigants best suited to assert a particular claim" (*Gladstone, Realtors, supra,* 441 U.S. at 100). For this reason, private citizens — who are not duly authorized government officials — may not attempt "to assert the States' interest in their legislative prerogatives" (*Flast* v. *Cohen,* 392 U.S. 83, 105 (1968)). And if a State declines to prosecute an appeal to this Court, an attempted appeal filed by a citizen who lacks standing to sue must be dismissed since the Court does "not sit to decide hypothetical issues or to give advisory opinions about issues as to which there are not adverse parties before us." *Princeton University* v. *Schmid,* 455 U.S. 100, 102 (1982).

Finally, the decisions of this Court establish that a citizen organization's "concern" over or "interest" in a legal issue is not a substitute for standing to sue in the constitutional sense. See *Doremus* v. *Board of Education, supra,* 342 U.S. at 435: "It is not a question of motivation but of possession of the requisite financial interest * * *." Thus, "sincerity" and "depth of * * *

commitment" do not confer standing to sue, "no matter how qualified the organization is in evaluating the problem" (*Schlesinger, supra,* 418 U.S. at 225-226). See also *Valley Forge Christian College, supra,* 454 U.S. at 486: "standing is not measured by the intensity of the litigant's interest or the fervor of his advocacy."

Applying these principles to the present case, it is clear that appellant does not have standing to defend a statute which the State of Washington has decided not to defend. Appellant has no interest apart from the general interest of all other citizens and utility ratepayers who may favor enforcement of the statute reviewed by the court of appeals. Accordingly, unless this Court is prepared to open the doors of the federal judiciary to citizens' complaints alleging the most general grievances concerning issues of broad public concern, the present appeal must be dismissed.[10]

2. Appellant's jurisdictional statement asserts only in the most conclusory fashion that appellant is a "citizens' group" which drafted and supported the Initiative at issue (J.S. 3). The motion for intervention filed in the district court adds little more of relevance. In its memorandum in support of that

[10] Decisions of responsible government officials to forgo appellate review in this Court occur with some regularity. On appropriate occasions, the Attorney General of the United States declines to appeal lower court rulings invalidating federal statutes after notifying Congress of that decision. See 28 U.S.C. (Supp. II) 519 note. If the appeal in this case were entertained, the Court would be confronted in the future with attempted appeals by "citizens' groups" alleging "interest" and "concern" comparable to the allegations of appellant here, even though the Attorney General of the United States, or the attorney general of the affected state, deliberately declined to pursue appellate review. Citizen appeals in government litigation could materially interefere with policy determinations of responsible government officials, who have concluded that the public interest would best be served by "a prompt, final resolution of that litigation" (Add., *infra,* A-1).

motion, appellant states that its members participated in the drafting of the Initiative, canvassed voters to muster public support, and spent funds collected from the public to obtain passage of the measure (memorandum at 2-10). And in an attached affidavit of its president, appellant also states that its membership at one time included "utility ratepayers who could be directly affected by the WPPSS projects * * *" (affidavit at 3).[11]

Generalized allegations of this kind do not, however, take appellant and its members out of the category of concerned bystanders or demonstrate the kind of direct, particularized injury needed to invoke the judicial process.

a. Appellant's asserted interest in the present litigation, based on its members' activities as concerned "citizens" who supported the Initiative at issue, does not confer standing to sue. If it did, any citizen who supported a piece of legislation, lent aid in obtaining its passage, or contributed funds to generate publicity, would be empowered to stand in the shoes of the Attorney General and to litigate the constitutionality of the enactment. But citizens share only a generalized and undifferentiated interest in state statutes which they favor. Their concerns — however valid and public-spirited — are not justiciable in federal court because they are "shared in substantially equal measure by all or a large class of citizens" (*Warth* v. *Seldin, supra,* 422 U.S. at 499). Mere "interest" in, or "concern" over, a particular piece of legislation does not confer standing to sue: it does not separate appellant from the hundreds of thousands of other concerned citizens who supported the statute in question.

It is irrelevant that appellant here was permitted to intervene as an additional defendant in the district court. At that stage of the proceeding, an actual case or controversy

[11] As previously noted, these documents have been lodged with the Court. The affidavit does not disclose the identity of the current members of the organization, or even indicate their present number.

existed. State officials charged with enforcement of the Washington statute vigorously defended its validity. The district court was not required to, and did not, ascertain whether appellant had "standing" in the constitutional sense absent the active participation of those state officials.[12] See *Princeton University* v. *Schmid*, 455 U.S. 100, 101-103 & n. * (1982), where a private organization was permitted to "intervene" as a "party" in government litigation. When the government subsequently declined to appeal the case, the private organization was found to lack "standing" to prosecute the litigation in this Court and its attempted appeal was dismissed.

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[12] Thus, it was unnecessary to determine whether appellant, participating as an intervenor, had standing under Article III. See 7A C. Wright & A. Miller, *Federal Practice & Procedure* §1911 at 539-540 (1972 ed.) (Rule 24 "plainly dispenses with any requirement that the intervenor shall have a direct personal or pecuniary interest in the subject of the litigation"). Moreover, despite appellant's intervention in the lower courts, it is incumbent upon "the Court itself" to determine whether appellant has "standing" absent the participation of responsible government officials. See *Princeton University* v. *Schmid*, 455 U.S. 100, 102 n. * (1982).

Looking beyond form to substance, it is quite clear that no case or controversy ever existed between appellees and appellant. The role of appellant at all stages of this litigation has been essentially that of an amicus curiae. It could not seriously be contended that a suit filed by appellees solely against appellant — a "citizens' group" without law enforcement powers — would present an actual case or controversy between adverse parties. And certainly the "citizens' group" could not have filed suit against appellees. The only adverse parties in the lower courts were appellees and the state officials who threatened to enforce Initiative 394 to the detriment of the financial interests of appellees and public bondholders. Since those state officials have declined to invoke this Court's appellate jurisdiction to overturn the injunction entered against them (J.S. App. 23a), appellant's constitutional claims are presented in the abstract — not in the context of a live case or controversy between adverse parties.

Nor does it matter that appellant has expended time and money collected from certain contributors to promote the passage of the Initiative or that it has acquired "expertise" on the subject matter. The same could be said of the separationist group in *Valley Forge Christian College*, which claimed to be an organization with 90,000 members possessing "unique attributes," including "knowledge and resources," that vested it with special competence "to litigate Establishment clause issues." It expended substantial time and money in challenging an allegedly improper property transfer at issue in that case, as well as in advocating its positions nationwide. See No. 80-327 Appellee's Br. at 8-9, 31-32. This Court nonetheless ruled that "standing is not measured by the intensity of the litigant's interest or the fervor of his advocacy" — or by the "clash" of political views, however "real" and "strong" (454 U.S. at 478, 486). Accord, *Schlesinger, supra*, 418 U.S. at 210 n. 1, 225-226, holding that "a national unincorporated association of present and former officers and enlisted members of the Reserves, organized for the purpose of opposing the military involvement of the United States in Vietnam and of using all lawful means to end that involvement * * *," lacked standing to challenge the constitutionality of the military status of members of Congress, notwithstanding the organization's deep political involvement in the underlying issue. Despite "the sincerity of respondents' stated objectives and the depth of their commitment," the constitutional requirement of a direct personal stake was not satisfied. See also *Sierra Club* v. *Morton*, 405 U.S. 727, 739 (1972), holding that "mere 'interest in a problem,' no matter how longstanding the interest and no matter how qualified the organization is in evaluating the problem, is not sufficient * * *." In that case, the organization expended time and money to participate in public hearings on the proposed land development project, and also waged an intensive campaign to lobby "officials of the Forest Service and the Department of the Interior." *Id.* at 730; see also *Simon, supra*, 426 U.S. at 39-40.

Appellant's interest in the present litigation differs not at all from the political interest of the unsuccessful litigants in the foregoing cases. This Court's decisions denying standing in those cases compel dismissal of the instant appeal.[13]

b. Nor does appellant have standing to invoke this court's jurisdiction simply because some of its members are "ratepayers" who "could" be affected by the outcome of the present litigation. Appellant has not even attempted to assert a good faith pocketbook claim, based on an ascertainable dollars and cents injury. To the contrary, its claim of possible economic harm is conjectural and remote and does not confer standing under Article III.

As appellant repeatedly asserts in its jurisdictional statement, Initiative 394 does not "mandate a substantive result" for ratepayers (J.S. 3, 9). Thus, the statute does not require any reduction in electricity rates, for it "does not, by its terms, limit spending" (J.S. 28). Whether or not this general scheme of

[13] The decision of the court of appeals invalidating Initiative 394 does not, of course, bar appellant or its members from advocating the adoption of alternative legislation to deal with cost containment problems of power generating facilities (see J.S. App. 16a-20a). The Attorney General of Washington already has secured agreement to implement alternative remedies. See Add., *infra*, A-1 to A-5. Thus, at issue in this case is a single remedy for a perceived problem: a remedy now abandoned by the elected officials of the state after a careful review of public policy considerations. Whatever appellant's interest in continuing to support a statute that the State of Washington declines to defend, that interest is not distinguishable from the undifferentiated interest of any other concerned citizen who favors the statute. See *Schlesinger, supra*, 418 U.S. at 216-217. As this Court has emphasized, "assertion of a right to a particular kind of Government conduct * * * cannot alone satisfy the requirements of Art. III without draining those requirements of meaning." *Valley Forge Christian College, supra*, 454 U.S. at 483.

"citizen review" (J.S. 7, 26) ultimately would decrease the rates paid by consumers is a matter of sheer conjecture.[14]

Indeed, if inference is to be indulged, it is probable that the statute would increase — rather than decrease — utility rates, at least for the immediate and intermediate term. As the jurisdictional statement concedes (J.S. 4), WPPSS to date has issued revenue bonds with a face value of several billion dollars. And the utility system is "obligated by contract to pay off this debt from rates charged to [its] ratepayers even if the projects are never completed" (*id.* at 4). If the scheme of "citizen review" advocated by appellant were permitted to jeopardize the sale of additional bonds, that would only hinder the completion of Projects 1, 2 and 3 and leave ratepayers with the burden of preexisting debt without any new source of income.

Based on all of the evidence — including all of the evidence tendered by appellant — the district court found (J.S. App. 21a to 22a) that Initiative 394 casts into doubt "the ability of the Supply System to finance the completion of each project." It also found that the statute has reduced the value of WPPSS "bonds on the secondary market" (*ibid.*; see also J.S. App. 15a-16a), thus raising the future cost of capital to WPPSS.

[14] As appellant points out, the immediate economic effect of the statute is "contingent" (J.S. 19 n. 19) on the unknowable result of a political debate and referendum vote (J.S. 6-7, 28; J.S. App. 6a-9a). The intermediate effect of any referendum vote on the financial condition of a utility system would depend on all of the economic circumstances governing its operations, including the level of its revenues, existing debt service obligations and general business expenses, present capital needs, available investment options, and prevailing regulatory constraints. Accordingly, to predict economic consequences for individual ratepayers as a result of the adoption of a statutory scheme of "citizen review" would be a matter of blind guesswork, whether considered from the point of view of "the real economic world" or the "economist's hypothetical model." *Illinois Brick* v. *Illinois*, 431 U.S. 720, 742 (1977).

The findings of the district court only confirm that appellant's financial stake "is at best speculative and at worst nonexistent" (*Valley Forge Christian College, supra,* 454 U.S. at 480 n. 17; *Simon, supra,* 426 U.S. at 44-46). Thus, appellant has failed to establish, without impermissible reliance on conjecture and speculation, that ratepayers "personally would benefit in a tangible way from the court's intervention" (454 U.S. at 481 n. 17). Stated otherwise, appellant's purported economic interest is wholly "uncertain" and "indeterminable" (*Frothingham, supra,* 262 U.S. at 487).[18]

c. Nor can appellant find comfort in *Flast* v. *Cohen,* 392 U.S. 83 (1968), which confers "taxpayer" standing on plaintiffs who allege substantial expenditures by the legislature in violation of a specific constitutional prohibition. This Court repeatedly has declined to extend *Flast.* See *Valley Forge Christian College, supra,* 454 U.S. 478, 482; *Schlesinger, supra,* 418 U.S. at 227-228; *Richardson, supra,* 418 U.S. at 174-175. And to apply the rationale of *Flast* here would twist this Court's holding in that case beyond all recognition.

Appellant here is not challenging the threatened disbursement of tax revenues in violation of the federal constitution. Quite to the contrary, it is seeking to give effect to a state statute which has been invalidated on federal constitutional grounds. And, in stark contrast to a taxpayer who seeks to halt an ascertainable loss of government funds by

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[18] While the statute's effect on the financial situation of ratepayers is entirely speculative for the reasons summarized above, the impact of the statute on the rights of bondholders and the United States is direct, substantial, and adverse. As explained by the district court and the court of appeals (J.S. App. 15a-16a, 21a-23a), the statute jeopardizes the "ability of WPPSS to carry out its covenants in the manner originally promised," and abrogates "central" security provisions which were a major "inducement to contract." As a consequence, the statute has the effect of "reducing the value of [the] bonds on the secondary market" (J.S. App. 22a).

enjoining an illegal disbursement, appellant here seeks only to vindicate the general public interest in enforcement of a "citizen review" procedure of conjectural economic benefit to its members. Because appellant has proven no interest that differs from the abstract interest of all other citizens and ratepayers who favor the Initiative, and because it requires "unadorned speculation" to perceive any personal financial benefit to appellant or its members that could result from this Court's intervention (*Simon, supra,* 426 U.S. at 44-45), it is wholly inappropriate to permit appellant "to employ a federal court as a forum in which to air [its] generalized grievances about the conduct of government" (*Richardson, supra,* 418 U.S. at 175).

d. In sum, traditional prudential considerations bar a "citizens' group" such as appellant from standing in the shoes of the Attorney General of the State of Washington. The Attorney General alone is empowered to defend the constitutionality of state statutes and to seek review in this Court of injunctive orders entered against state officials (see J.S. App. 23a). Where, as here, the Attorney General declines for reasons of public policy to take an appeal to this Court, he acts on behalf of *all* of the people of the state — including concerned "citizens' groups." Beyond this, appellant's attempted appeal is foreclosed by Article III of the Constitution. In the absence of particularized injury that is concrete in nature, appellant may proceed no further and its appeal to this Court should be dismissed.[16]

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[16] Appellant's failure to demonstrate that it has standing under governing prudential and constitutional criteria appears not merely as a deficiency in pleading, but also as a deficiency in proof following a hearing on the merits. As appellant acknowledges, it has had the opportunity to submit "thousands of pages" of record materials and "more than 80 pages of proposed findings" (J.S. 8). Despite that opportunity to fully establish its status and interest as a matter of record in the district court, appellant has not come close to satisfying the traditional prerequisites of the standing doctrine.

II. BECAUSE THE COURT OF APPEALS CORRECTLY APPLIED LEGAL PRINCIPLES RECENTLY ARTICULATED BY THIS COURT, PLENARY REVIEW OF ITS DECISION WOULD SERVE NO USEFUL PURPOSE

In the alternative, appellee Continental Bank submits that the judgment of the court of appeals should be affirmed. Since the motions to dismiss or affirm filed by the United States, Seattle-First National Bank, and Morgan Guaranty Trust Company of New York adequately demonstrate that the decision below correctly applies well-established legal principles to the facts of record, there is no point in repeating that analysis here. For the reasons stated in those motions, the decision of the court of appeals should be affirmed summarily if the present appeal is not dismissed.

At a time when this Court's docket is burdened with a steadily increasing number of cases raising novel questions of substantial public importance, it would serve no useful purpose to grant plenary review in a case such as this, in which the lower courts faithfully applied legal principles recently articulated by this Court in *United States Trust Co.* v. *New Jersey,* 431 U.S. 1, 14-32 (1977), and *Allied Structural Steel Co.* v. *Spannaus,* 438 U.S. 234, 240-251 (1978). This Court reaffirmed those principles earlier this Term in *Energy Reserves Group, Inc.* v. *Kansas Power and Light Co.,* 51 U.S.L.W. 4106, 4109 n. 14 (1983): "When a State itself enters into a contract, it cannot simply walk away from its financial obligations. In almost every case, the Court has held a governmental unit to its contractual obligations when it enters financial or other markets. * * * When the State is a party to the contract, 'complete deference to a legislative assessment of reasonableness and necessity is not appropriate because the State's self-interest is at stake.'" These precedents apply directly here, and require affirmance of the decision of the court of appeals.

CONCLUSION

The appeal should be dismissed for lack of jurisdiction. In the alternative, the judgment of the court of appeals should be summarily affirmed.[17]

Respectfully submitted.

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MARCH 1983

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[17] Considerations of public policy militate strongly in favor of summary disposition. As fully explained in the motion to dismiss or affirm filed by the United States, each additional day of delay in finally concluding this litigation imposes a substantial financial burden on WPPSS by obstructing its ability to market new bonds and by interfering with its ability to complete construction of Projects 1, 2 and 3. In the words of the Attorney General of the State of Washington, "The Washington Public Power Supply System is not a party to the [present] litigation but is directly affected by the results thereof and needs a prompt, final resolution of that litigation" (Add., *infra*, A-1).

THE SEAL OF THE STATE OF WASHINGTON

OFFICE OF THE
ATTORNEY GENERAL

AGREEMENT BETWEEN STATE OF WASHINGTON AND THE WASHINGTON PUBLIC POWER SUPPLY SYSTEM

Preamble

On January 10, 1983, the United States Court of Appeals for the Ninth Circuit (# 82-3404) affirmed the conclusion of the United States District Court for the Western District of Washington in *Continental Illinois National Bank and Trust Co. of Chicago, et al.* v. *State of Washington, et al. and Don't Bankrupt Washington Committee, Intervenor,* (C82-94T) and *United States* v. *State of Washington and Don't Bankrupt Washington Committee, Intervenor,* (C82-395T) concluding that the contract clause of the United States Constitution renders the voter approval provisions of Initiative 394 (chapter 6, Laws of 1981, 2nd Ex. Sess.) not applicable to the financing of construction of Washington Public Power Supply System's Projects 1, 2, and 3. The District Court concluded that the cost effectiveness study requirements of initiative 394 are not severable and, therefore, do not apply to those projects. The Ninth Circuit Court of Appeals did not address that conclusion on the assumption that such cost effectiveness studies were being undertaken.

The Washington Public Power Supply System is not a party to the above-referred to litigation but is directly affected by the results thereof and needs a prompt, final resolution of that litigation.

KEN EIKENBERRY
Attorney General
Temple of Justice,
Olympia, Washington 98504

OFFICE OF THE ATTORNEY GENERAL

The State of Washington in defending the policy determination made by the voters of this state in enacting Initiative 394, must consider whether to seek judicial review by the United States Supreme Court. In making that consideration, the state must assess the opportunity to achieve a modification or reversal of the determination made by the Ninth Circuit Court of Appeals, the changes and circumstances which have occurred by virtue of the passage of Initiative 394, and the consequences to the citizens of the State by continuing this litigation.

The parties to this agreement have concluded that it is in the mutual interests of the State, its citizens, and the Washington Public Power Supply System to reach the following agreement.

Obligations by the Washington Public Power Supply System

The Washington Public Power Supply system agrees, convenants, and obligates itself prior to the issuance of any bonds of indebtedness on Projects 1, 2 or 3 to:

(1) Determine the anticipated costs of construction of the project;

(2) Select, subject to the approval of the State Finance Committee, an independent consultant to conduct a cost-effectiveness study pertaining to the energy project under consideration which is the subject matter of the proposed bonded indebtedness, and to provide the independent consultant with adequate resources to conduct the study;

(3) The independent consultant shall prepare a comprehensive cost-effectiveness study with reference to the project and shall include as part of that report a summary identifying:

(a) the name, location, and type of major public energy project, expressed in common terms;

(b) the dollar amount and type of bonds being requested;

(c) if the bond issuance is intended to finance the acquisition of all or a portion of the project, the anticipated total cost of the acquisition of the project;

(d) if the bond issuance is intended to finance the planning or construction of all or a portion of the project, the anticipated total cost of construction of the project;

(e) the projected average rate increase for consumers of the electricity to be generated by the project. The rate increase shall be that which will be necessary to repay the total indebtedness incurred for the project, including estimated interest;

(f) a summary of the cost-effectiveness study;

(g) the anticipated functional life of the project;

(h) the anticipated decommissioning costs of the project.

(4) One hundred copies of said study must be submitted to the Secretary of State, and five copies to the Washington State Energy Office.

(5) The study shall be available for public review and comment, including review and comment by the Washington State Energy Office, for thirty days.

(6) After the period of availability for public review and comment the consultant shall prepare a final draft of the study which includes public comment, if any. The final draft shall note and respond to any comments transmitted to the consultant by the Washington State Energy Office. The said final report shall be promptly filed with the Secretary of State.

The parties recognize that the cost-effectiveness studies for Projects 2 and 3 are substantially completed and the period for public comment on the same has expired. Therefore, upon the completion of the final draft and the acceptance of the same, the only remaining obligation is to promptly file the final draft of the studies with the Secretary of State.

Washington Public Power Supply System further agrees and covenants that if Projects 4 and 5, which have been terminated, are revived under the ownership of or financing by the Power Supply System that it will, irrespective of whether Initiative 394 applies to such projects, comply with the cost-effectiveness study requirements set forth in this contract for Projects 1, 2, and 3.

If costs of construction exceed the anticipated cost of construction upon which the cost-effectiveness study was predicated, then another cost-effectiveness study must be made prior to issuing bond indebtedness for financing such additional costs. Such an additional cost-effectiveness study requirement is required as a condition precedent to the issuance of bonded indebtedness in excess of the amount identified as the cost of construction upon which the prior cost effectiveness study was predicated.

Terms used in this contract shall have the meaning ascribed to them by definitions set forth in § 3, chapter 6, Laws of 1981, 2nd Ex. Sess.

Agreement by the State of Washington

The Attorney General as counsel for the State of Washington and state officers named as parties in *Continental Illinois National Bank and Trust Co. of Chicago, et al.* v. *State of Washington, et al. and Don't Bankrupt Washington Committee, Intervenor,* and *United States* v. *State of Washington and Don't Bankrupt Washington Committee, Intervenor,* Ninth Circuit Court of Appeals #82-3404, having considered all matters relating to the availability of review by the United States Supreme Court and the contractual undertaking by the Washington Public Power Supply System under this agreement, hereby promises and agrees *not to seek review* by the United States Supreme Court. This agreement does not preclude the State from participating in further proceedings in this litigation

if the court should order further proceedings nor does it preclude the state from expressing its views to the United States Supreme Court if the Court accepts for review that which is sought by any other party to the litigation.

AGREED TO THIS 11th day of February, 1983.

/s/ ROBERT L. FERGUSON	/s/ KEN EIKENBERRY
Washington Public Power Supply System	Attorney General State of Washington

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Founded in 1866 as
Williams & Thompson

March 1, 1983

The Honorable Rex E. Lee
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United States Department of Justice
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Mayer, Brown & Platt
231 South LaSalle Street
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William R. Squires, Esq.
Davis, Wright, Todd, Riese & Jones
4200 Seattle-First National Bank Bldg.
Seattle, Washington 98154

Re: The Don't Bankrupt Washington Committee v. Continental Illinois National Bank and Trust Company, Seattle-First National Bank and Morgan Guaranty Trust Company of New York, and the United States of America, No. 82-1445

Dear Messrs. Lee, Auwarter and Squires:

As required by the rules of the Supreme Court, I am enclosing a notice of The Don't Bankrupt Washington Committee's appeal in the Supreme Court in the above-captioned case. I am also enclosing an appearance form.

Since the State appellants have decided not to appeal, the Supreme Court Clerk's office asked the Committee to change the cover of the Jurisdictional Statement. I am also, therefore, enclosing a photo-copy of the revised cover. Except for the change on the cover, and a small conforming change on page one of the Jurisdictional Statement, the copies of the Jurisdictional Statement served on you are identical to those now in the possession of the Court. (The Jurisdictional Statement was docketed with the Court on February 25, 1983 as required by the stipulation between the parties, and the copies with the revised cover were presented to the Clerk on February 28, 1983.)

Sincerely,

/s/ BEN W. HEINEMAN, JR.
Ben W. Heineman, Jr.

BWH/kr
Enclosures

cc: Richard K. Willard, Esq.

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Founded in 1866 as
Williams & Thompson

February 25, 1983

Mr. Alexander L. Stevas
Clerk
United States Supreme Court
Washington, D.C. 20543

Re: State of Washington, et al. v. Continental Illinois National Bank & Trust Company, et al.; and State of Washington, et al. v. United States of America

Dear Mr. Stevas:

Pursuant to Rule 12.3, Rules of the Supreme Court, I am hereby docketing the above-captioned case in this Court on behalf of The Don't Bankrupt Washington Committee, intervenor-appellant, by filing with you an appearance form, a check for $200 as required by Rule 45(a), 40 copies of a jurisdictional statement, and a certificate of service as required by Rule 28.

Pursuant to Rule 10.4 of this Court, this letter shall also serve to inform you that it is the belief of intervenor-appellant that the State appellants below (the State of Washington, the Governor of Washington, John Spellman, the Secretary of State of Washington, Ralph Munro, and the Attorney General of Washington, Kenneth Eikenberry) have no interest in the outcome of this appeal and do not intend to file a jurisdictional statement. A copy of this letter — which constitutes the notice required by Rule 10.4 — is also being served on the parties below as indicated in the attached certificate of service.

Thank you for your cooperation in this matter.

Sincerely,

/s/ BENJAMIN W. HEINEMAN, JR.
Benjamin W. Heineman, Jr.

BWH/kr
Enclosures

cc: The Solicitor General
Richard K. Willard
William R. Squires
Franklin P. Auwarter
Kenneth O. Eikenberry